

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CLARENCE GIVENS,

Plaintiff,

v.

KENNETH LUEDTKE, JEANNE
GREENWOOD, and JOHN/JANE DOE,

Defendants.

OPINION AND ORDER

13-cv-848-wmc

Plaintiff Clarence Givens has filed a proposed civil action under 42 U.S.C. § 1983, alleging that he was denied prompt and adequate medical care by the defendants. Plaintiff has been found indigent and he requests leave to proceed under the federal *in forma pauperis* statute. 28 U.S.C. § 1915(a). Because he is incarcerated, the court must also screen his complaint and dismiss any portion that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b). In addressing any *pro se* litigant's complaint, the court must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Even under this lenient standard, the complaint must be dismissed for reasons set forth briefly below.

ALLEGATIONS OF FACT

For purposes of this order, the court accepts the plaintiff's well-pled allegations as true and assumes the following probative facts:

Plaintiff Clarence Givens is currently incarcerated by the Wisconsin Department of Corrections (“WDOC”) at the Stanley Correctional Institution. Defendant Kenneth Luedtke is a dentist employed at WDOC’s Dodge Correctional Institution. The other defendants (Jeanne Greenwood and John/Jane Doe) are supervisory officials in the Health Services Unit at the Waupun Correctional Institution (“WCI”).

During a dental procedure that took place on January 11, 2007, while Givens was assigned to WCI, he requested dental care for a chipped tooth and a filling that had fallen out. On January 19, 2007, Luedtke performed a root canal and placed a temporary filling on Givens’s tooth. During the procedure, Luedtke noticed a lesion on the roof of plaintiff’s mouth. Luedtke informed plaintiff that he would be sent to an oral surgeon to evaluate the lesion.

On January 28, 2007, plaintiff submitted an emergency dental service request to address severe pain caused by the temporary filling placed by Luedtke. The following day, Luedtke prescribed a topical anti-inflammatory used to treat infection (Kenalog in Orabase), instructing Givens to apply it two to three times a day.

Three days later, on February 1, Givens submitted a second emergency dental service request to address his continued severe pain. Luedtke did not respond to this request right away. Instead, defendants Greenwood and Doe addressed the request “under [a] triage system.” Luedtke eventually saw Givens again on February 7, when he extracted the tooth causing Givens’s pain. At that time, Luedtke noted that the lesion in Givens’s mouth appeared to be healing. Luedtke directed plaintiff to continue using Kenalog in Orabase and also prescribed Tylenol.

On February 11, Givens submitted a third emergency dental service request, reminding Luedtke that he was supposed to see an oral surgeon for the lesion on the roof of his mouth, which was still causing him pain. Luedtke did not respond, although at a follow-up appointment on March 8, 2007, a dental hygienist examined Givens and observed “blood and pus gushing from the hole” in the roof of his mouth. Plaintiff was transported to the Dodge Correctional Institution, where dental staff took x-rays of his face and made an appointment for a CT scan. When the results were insufficient to diagnose plaintiff, WDOC medical staff transferred him to the University of Wisconsin Hospital.

At the UW Hospital in March 2007, doctors performed additional tests, including a biopsy of the lesion and an MRI, suspecting that he had osteomyelitis – a type of bone infection or inflammation. On April 10, 2007, doctors concluded that the biopsy was benign and prescribed penicillin to begin treating Givens for osteomyelitis. On April 27, a specialist diagnosed Givens with osteomyelitis of the hard palate and ordered him to be treated with penicillin administered continuously through a peripheral inserted central catheter (“PICC”) line.

During a July 20, 2007, visit to UW Hospital, doctors confirmed plaintiff’s diagnosis of osteomyelitis and concluded that the penicillin treatment had cured the disease. During this same visit, plaintiff alleges, a doctor also concluded that Givens developed the disease “following a dental procedure in March (07).” Doctors informed plaintiff to alert WDOC medical staff if he developed symptoms suggesting a return of the infection.

On August 29, 2007, plaintiff's mouth again became sore. He submitted a dental service request, but Luedtke informed him that the pain was most likely from eating hard food. During a February 8, 2008, visit to health services, medical staff noticed a 0.5 cm by 0.5 cm tissue damage in plaintiff's mouth. For the next year and a half, plaintiff repeatedly complained of pain in the roof of his mouth, but was only prescribed an antibiotic, Clindamycin, for treatment. On January 15, 2009, plaintiff filed an inmate complaint regarding his medical treatment, but his complaint was apparently dismissed by WDOC officials.

In 2010, plaintiff began experiencing severe lower back and hip pain. Over the next two years, plaintiff underwent diagnostic tests, steroid treatments, and, ultimately, a hip replacement surgery on June 3, 2013. After conducting his own medical research, plaintiff now alleges that his back pain was a symptom of his osteomyelitis, and that all of the medical issues he identifies in his complaint resulted from Luedtke's failure to use sanitized dental tools during the January 2007 procedure.

OPINION

A complaint may be dismissed for failure to state a claim where the plaintiff alleges too little, failing to meet the minimal federal pleading requirements found in Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a) requires a "short and plain statement of the claim' sufficient to notify defendants of the allegations against them and enable them to file an answer." *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006). While it is not necessary for a plaintiff to plead specific facts, he must articulate "enough

facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In doing so, a plaintiff may plead himself out of court. See *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008); see also *Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir. 1995) (“[A] plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts. Allegations in a complaint are binding admissions, and admissions can of course admit the admitter to the exit from the federal courthouse.”) (citations omitted). In that respect, when a plaintiff pleads facts showing that he does not have a claim, the complaint should be dismissed “without further ado.” *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004). Similarly, while a defendant must usually plead the affirmative defense of a statute of limitations, “when the plaintiff’s submissions reveal a defense to be airtight ... dismissal at screening [is] appropriate.” *Hayes v. Hile*, 527 F. App’x 565, 566 (7th Cir. 2013); see also *Logan v. Wilkins*, 644 F.3d 577, 582 (7th Cir. 2011) (“[W]hen the allegations of the complaint reveal that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim.”).

As outlined above, plaintiff alleges that he was denied adequate dental care in violation of the Eighth Amendment, but his pleadings also includes an “airtight” statute of limitations defense, meaning his claims are untimely. Because 42 U.S.C. § 1983 does not contain an express statute of limitations, this court must adopt the forum state’s limitation period for personal injury claims. *Farrell v. McDonough*, 966 F.2d 279, 280 (7th Cir. 1992) (“[A]ll section 1983 actions are best characterized as personal injury

actions and . . . courts should therefore apply a state's *personal injury* statute of limitations to all section 1983 actions arising in that state.”) (original emphasis). In Wisconsin, the applicable statute is Wis. Stat. § 893.53, which sets forth a limitation period of six years. *Wudtke v. Davel*, 128 F.3d 1057, 1061 (7th Cir. 1997).¹

For “§ 1983 claims, a cause of action accrues when the plaintiff knew or should have known that [he] had sustained an injury.” *Barry Aviation Inc. v. Land O’Lakes Mun. Airport Comm’n*, 377 F.3d 682, 688 (7th Cir. 2004). In this case, plaintiff’s injury allegedly occurred during the root canal procedure that Luedtke performed on January 19, 2007, and plaintiff filed his complaint on December 10, 2013, nearly a year after Wisconsin’s six year statute of limitations had run.² Thus, plaintiff has affirmatively alleged that he missed the statute of limitations deadline.

Plaintiff cannot rely on his later hip and back pain as the starting point for his claim because he specifically alleges that “[i]t was the untreated infection of [osteomyelitis] and its recurrent symptoms that resulted in [plaintiff’s] constant severe hip and back pain, degenerative back/spine, and hip replacement.” (Compl. ¶ 62.) While some of the effects of his injuries may have occurred within the six years before plaintiff filed his complaint, later injuries “from the same tortious act [do] not restart the

¹ In addition to borrowing Wisconsin’s statute of limitations, this court must also apply the state’s tolling provisions. *Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989). However, none of Wisconsin’s tolling statutes apply in this case. See Wis. Stat. § 893.13, *et seq*; see also *Butler v. Schrieber*, 2010 WI App 135, ¶ 16, 329 Wis. 2d 710, 790 N.W.2d 543. Specifically, the statute “which made imprisonment a disability that tolled a limitation period was repealed in 1998.”

² Even assuming that plaintiff could not have known the *source* of the infection until June 20, 2007 -- the first date on which a doctor allegedly informed him that he contracted the infection during a dental procedure -- the result would not change.

running of the statute” of limitations. *Canfield v. City of Cedarburg, Inc.*, No. 06-cv-0373, 2007 WL 2327064, at *3 (E.D. Wis. Aug. 10, 2007) (quoting *Fojut v. Stafl*, 212 Wis.2d 827, 832, 569 N.W.2d 737 (1997)). In other words, lingering effects or consequences of a discrete violation do not extend the statute of limitations. See *United States v. Midwest Generation, LLC*, 720 F.3d 644, 646-47 (7th Cir. 2013); *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 801-02 (7th Cir. 2008); *Pitts v. City of Kankakee, Ill.*, 267 F.3d 592, 596-97 (7th Cir. 2001).

Because plaintiff explicitly links his later ailments to the dental procedure performed by Dr. Luedtke in January 2007, his allegations of lingering consequences do not excuse his failure to file a timely complaint. Accordingly, the court must dismiss plaintiff’s complaint as untimely. See *Jones v. Bock*, 549 U.S. 199, 215 (2007) (where plaintiff’s allegations “show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim”).

Alternatively, Givens’s central allegation against Dr. Luedtke (that he caused Givens to contract an infection by using unsanitary tools during a dental procedure) does not articulate a violation of the Eighth Amendment. Allegations of medical malpractice, negligence or even gross negligence are insufficient to establish a claim under the Eighth Amendment, which requires a showing of deliberate indifference to a serious medical need. See *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976); see also *Knight v. Wiseman*, 590 F.3d 458, 463 (7th Cir. 2009) (“Deliberate indifference requires a showing of more than mere or gross negligence, but less than purposeful infliction of harm.”) (citations omitted). Givens also fails to establish that the other defendants (Greenwood and Doe)

had any personal involvement in the incident which forms the basis of his claim. *Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir. 2009) (rejecting the “contention that any public employee who knows (or should know) about a wrong must do something to fix it”). Thus, for this additional reason, the complaint fails to state a viable claim for purposes of 42 U.S.C. § 1983.

ORDER

IT IS ORDERED that:

1. Plaintiff Clarence Givens’s request for leave to proceed is DENIED and the complaint is DISMISSED with prejudice as untimely and for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983.
2. The dismissal will count as a STRIKE for purposes of 28 U.S.C. § 1915(g).
3. Plaintiff is advised that, once he accumulates three strikes, he will no longer be eligible to bring a civil action or appeal unless the pleadings reflect that he is under imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

Entered this 6th day of May, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge